

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-32

Date issued: November 7, 1994
Requested by: Brian D. Neugebauer
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- QUESTIONS PRESENTED -

I.

Whether the city commission of a city having a population of over 10,000 may enter into a PACE (Partnership in Assisting Community Expansion) loan agreement in which the city, in cooperation with the Bank of North Dakota, buys down the interest on a loan to a business located in that city, when the business is a sole proprietorship owned by the president of the board of city commissioners of that city.

II.

Whether the city commission of a city having a population of over 10,000 may grant a five-year tax exemption to a business located in the city, who otherwise qualifies, if that business is owned by the president of the board of city commissioners of that city.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the city commission of a city having a population of over 10,000 may not enter into a PACE loan agreement in which the city, in cooperation with the Bank of North Dakota, buys down the interest on a loan to a business located in that city, when the business is a sole proprietorship owned by the president of the board of city commissioners of that city, unless the other members of the city commission unanimously approve the agreement and unanimously adopt the finding required by N.D.C.C. ? 40-13-05.

II.

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It is my further opinion that the city commission of a city having a population of over 10,000 may not grant a five-year tax exemption to a business located in the city, that otherwise qualifies, if that business is owned by the president of the board of city commissioners of that city unless the other city commission members unanimously approve the exemption and unanimously adopt the finding required by N.D.C.C. ? 40-13-05.

- ANALYSES -

I.

The Partnership in Assisting Community Expansion (PACE) program is described in N.D.C.C. ch. 6-09.14. Whether it is legal for the city to enter into a PACE agreement or contract for the benefit of a business solely owned by the president of the board of city commissioners of the city turns on the interpretation of N.D.C.C. ?? 40-13-05 and 48-02-12.

N.D.C.C. ? 48-02-12 provides:

No governing board, nor any member, employee, or appointee thereof, shall be pecuniarily interested or concerned directly or indirectly in any public contract, either verbal or written, that may be entered into by any such board or officer.

This section is located in the North Dakota Century Code chapter on public building construction. The Attorney General's office has previously determined that N.D.C.C. ? 48-02-12 applies only to contracts for altering, repairing, or constructing public buildings within the scope of N.D.C.C. ch. 48-02. Letter from Attorney General Nicholas J. Spaeth to John J. Mahoney (December 30, 1992); Letter from Attorney General Nicholas J. Spaeth to Lawrence P. Kropp (June 26, 1990); Letter from Attorney General Nicholas J. Spaeth to Hugh P. Seaworth (April 7, 1987); Letter from Attorney General Nicholas J. Spaeth to Robert E. Alexander (July 29, 1985); and Letter from Attorney General Robert O. Wefald to David M. Wheelihan (April 13, 1983). The circumstances addressed in this opinion do not encompass the construction of public buildings pursuant to N.D.C.C. ch. 48-02. Thus, N.D.C.C. ? 48-02-12 is not applicable to the circumstances addressed in this opinion.

N.D.C.C. ? 40-13-05 provides:

Except as otherwise provided by law, no municipal officer, in a municipality having a population of ten thousand or more according to the last federal decennial census, shall be directly or indirectly interested in:

1. Any contract, work, or business of the municipality;
2. The sale of any article the expense, price, or consideration of which is paid from the municipal treasury or by any assessment levied by any act or ordinance; or
3. The purchase of any real estate or other property belonging to the municipality or which shall be sold for taxes or assessments or by virtue of any process issued in any suit brought by the municipality.

Provided, however, that the foregoing shall not be applicable if unanimously approved by the other members of the governing body of the political subdivision by a finding unanimously adopted by such other members and entered in the official minutes of the governing body, to be necessary for the reason that the services or property obtained are not otherwise available at equal cost.

N.D.C.C. ? 40-13-05 prohibits city officers in large cities from being directly or indirectly interested in any contract of the city. The last sentence, however, provides an exception to the broad prohibition provided under N.D.C.C. ? 40-13-05 whenever the governing body unanimously approves the matter and unanimously adopts a finding that any services or property obtained are not otherwise available at equal cost.

Thus, it is my opinion that, unless otherwise provided in the law, subsection 1 of N.D.C.C. ? 40-13-05 prohibits city officers in large cities from being interested in any contract, work, or business of the city. It is also my opinion that this prohibition is overcome when the other members of the governing body unanimously approve the action and unanimously adopt a finding that the services or property obtained are not otherwise available at equal cost.

In the question presented the city is seeking economic

development for the local community through the PACE loan agreement. Whether the economic development services or property are otherwise available at equal cost is a question of fact for the city commission to determine. For example, the city commission could reasonably determine that it is necessary for the city to utilize the PACE program to obtain the PACE program's economic development services which if not utilized would otherwise not be available at equal cost to the city. Once this commitment is made, it becomes necessary for the city to evaluate the funding of economic development projects in the same manner it would evaluate the purchase of more conventional services or property. After going through this evaluation, the fact that the city commission chooses to fund an economic development project in which the president of the board is involved would not, because of this conflict, preclude the city from selecting that project if it is in the best interests of the city to do so.

II.

For the same reasons as indicated in part I of the analysis in this opinion, it is my opinion that N.D.C.C. ? 48-02-12 does not apply to the tax exemption issue. However, N.D.C.C. ? 40-13-05 is relevant.

N.D.C.C. ? 40-13-05 prohibits city officers in large cities from being interested in "[a]ny . . . work, or business of the municipality." The question remains whether the city's approval of a tax exemption pursuant to N.D.C.C. ch. 40-57.1 constitutes "work, or business of the municipality" within the meaning of N.D.C.C. ? 40-13-05.

The terms "work" and "business" are not defined. Thus, those two words are to be understood in their ordinary sense. See N.D.C.C. ? 1-02-02. The dictionary defines "work" to include "[s]omething that one is doing, making, or performing, esp. as a part of one's occupation; a duty or a task Something that has been done, made, or performed as a result of one's occupation, effort or activity" The *American Heritage Dictionary* 1390 (2d coll. ed. 1991). The dictionary defines "business" to include "[o]ne's rightful or proper concern or interest." *Id.* at 220.

The North Dakota Supreme Court has not had occasion to construe N.D.C.C. ? 40-13-05. However, in People v. Scharlau, 565 N.E.2d 1319 (Ill. 1990), the Illinois Supreme Court construed a similar Illinois statute which provided, in part,

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that "[n]o municipal officer shall be interested, directly or indirectly . . . in any contract, work or business of the municipality" Id. at 1325. The court agreed that the legislative intent in enacting the statute "was to codify 'sweeping prohibition[s] against public officials and officers engaging in conduct which divides their loyalty between their personal interests and their fiduciary duties.'" Id. The court construed the terms "work" and "business" as used in the statute quite broadly, noting that "[t]hese two latter terms are also compendious, and envision a broad range of behavior and relationships." Id. See also Huszagh v. City of Oakbrook Terrace, 243 N.E.2d 831, 833 (Ill. 1969) (The purpose of statutory provisions prohibiting municipal officers from being interested "directly or indirectly, in any contract, work, or business of the municipality" is to prohibit such officers "from being interested, directly or indirectly, in any business of the city.")

Based on the foregoing, it is my opinion that a city's approval of a tax exemption pursuant to N.D.C.C. ch. 40-57.1 constitutes work or business of the municipality. Therefore, it is my opinion that N.D.C.C. ? 40-13-05 prohibits the city from giving such tax exemption to a sole proprietorship owned by the president of the board of city commissioners of that city unless the other commission members unanimously approve the exemption and unanimously adopt a finding that the services or property obtained are not otherwise available at equal cost.

In the case of a tax exemption, the service or property which the city is gaining is again economic development or the increased tax revenue anticipated as a result of the short-term tax exemption. Whether the services or property obtained are otherwise available at an equal cost is a factual determination to be made by the city commission. The analysis the city commission would use is similar to that discussed under part I. For example, many economic development projects use a variety of different incentives to make that project feasible. For instance, if the economic development project included the coupling of a PACE loan and the necessity of providing a short-term tax exemption, then the city commission should not be precluded from providing that exemption pursuant to the exception in N.D.C.C. ? 40-13-05.

- EFFECT -

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This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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ATTORNEY GENERAL

Assisted by: David E. Clinton, Assistant Attorney General

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